

Towards a Common Core of Residential Tenancy Law in Europe? The Impact of the European Court of Human Rights on Tenancy Law

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University Bremen

ZERP

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Towards a Common Core of Residential Tenancy Law in Europe?

**The Impact of the European Court of Human Rights
on Tenancy Law**

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Editorial

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I. Introduction

Tenancy law regulates contractual and property rights governing the use of immovable property, and thus directly affects the daily lives of European citizens,¹ as about one third of the population depends on rented housing, a proportion which rises in some countries to more than 50%.² Residential tenancies, on which this contribution focuses,³ are thus likely to impact consumers more than any other legal area, even though tenancies are not normally treated as a branch of consumer law.⁴ Together with consumer and labour law, residential tenancy law forms a field of social private law where party autonomy is superseded as a core principle by mandatory provisions oriented toward solidarity among citizens.⁵ These provisions typically extend to some form of rent control, limitations on unilateral termination of a tenancy by the landlord, guarantees of habitability and other interventions into freedom of contract.

These social features reflect the embeddedness of tenancy law in a larger social, political and economic context, namely that of housing policy.⁶ Aside from private tenancy law, housing policy builds on a complex set of welfare state regulations, dealing with social housing (public or publicly sponsored private housing companies, such as non-profit associations in the UK and Holland providing housing for low-income groups), housing allowances (rent subsidies) for poor tenants, tax-law incentives and capital grants for housing construction etc. Beyond that, the public interest in housing extends to issues of

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- 1 EuSoCo Principles of Life-time Contracts, Principle 2 refers to this concept as considering human beings in their real-life context and placing the human dimension at the centre of lifetime contracts.
 - 2 For the data, see http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Housing_statistics. These figures include private tenancies at market price and “social housing” at decreased rents with public (or publicly subsidised private) landlords.
 - 3 Commercial tenancies will not generally be dealt with here as they are normally regulated in different ways and have widely different social and economic implications.
 - 4 EU consumer contract directives generally deal only with B2C-relations (which in tenancy contracts would presuppose a landlord renting out several apartments so as to qualify as a commercial party), but it should be noted that the legal basis for European consumer protection laid down in Art. 169 TFEU, and in particular para. 2 lit. b, does not contain any such restriction.
 - 5 EuSoCo Declaration 2012, Clause 8 calls for the protection of social interests to complement contractual freedom, and EuSoCo Principle 7 introduces the collective dimension, as well as general values of good morals and good faith, as influencing all stages of the contractual relationship.
 - 6 See, most recently, *T. Fahey/ M. Norris*, Housing, in: F. Castles/ S. Leibfried et al., *The Oxford Handbook of the Welfare State*, 2010, chapt. 33, 479.

macro-economic management, energy policy, neighbourhood policy, as well as urban and spatial planning. Ultimately, this complex regulatory context reflects different models of capitalism and of the welfare state. If the categorisation of Esping-Andersen is accepted – the social (Nordic), the liberal, and the corporatist welfare state – each category appears to present huge differences in housing policy.⁷ In addition, among welfare state actors, housing involves not only the state and the market but, to a significant extent, also the household (the family), *e.g.* when a household turns to the self-provision of housing by opting to purchase a home.⁸

Despite the fact such housing issues are treated abundantly at comparative level in sociology and economics, tenancy law remains nearly a blank space in the landscape of European private and comparative law. This is generally derived from its distinctly national or even regional character, its perceived strong political nature and its embeddedness in widely diverging national housing policies. Apart from some publications on selected issues, there are only a few, mostly outdated, more general accounts,⁹ and only one somewhat larger comparative project has been carried out.¹⁰

Yet, just as in most other fields, the performance and effectiveness of the legal system in the area of tenancy law depends increasingly not only on its regulatory law context but also on its interconnections to European law and policy. Thus, with the increase in mobility of European citizens and the growth of Europe-wide job markets and the boom in tourism, tenancy regulation is increasingly important to the Single Market. Equal access to national housing markets is generally available, as prescribed long ago by European law.¹¹ Yet

7 *G. Esping-Andersen*, *The Three Worlds of Welfare Capitalism*, 1990.

8 *G. Esping-Andersen*, *Social Foundations of Postindustrial Economies*, 1999.

9 See *J. Trenk-Hinterberger*, *Internationales Wohnraummietrecht*, 1977; *J. Stabentheimer*, *Mietrecht in Europa*, 1996; *A. Kletecka/ P. Oberhammer*, *Soziales Mietrecht in Europa*, 2011. For more recent articles, see, however, *E. Bargelli*, *Locazione Abitativa e Diritto Europeo. Armonie e Disarmonie di un Capitolo Del Diritto Privato Sociale, Europa e Diritto Privato 2007*, 951; *J. Ball*, *Housing law is dead: Long live European housing law?*, *The Journal of Legal Affairs & Dispute Resolution in Engineering and Construction*, 2 (2010), 21-30; *W. Hau*, *Mietrecht in Europa*, *JZ* 2010, 553.

10 Available at: <http://www.eui.eu/DepartmentsAndCentres/Law/ResearchAndTeaching/ResearchThemes/ProjectTenancyLaw>. The website contains 18 national reports, some background papers and a general report. Spanish scholars working in the field have also translated and e-published the general report of the project, see *Ch. Schmid*, *Los Arrendamientos de Vivienda en Europa*, available at: www.codigo-civil.net/wp-content/uploads/2006/09/uschmid.doc.

11 Regulation 1612/68 implementing equal treatment rights emanating from the free movement of workers stipulates in its Art. 9 that a national of a Member State who is

national systems in the host country may place tenants in unexpectedly unfavourable conditions.¹² The same may be true for relatively long periods of notice required of tenants in their country of origin, which may force a worker who moves to pay rent on two different properties over an extended period and so act as a disincentive to intra-European mobility. Moreover, European citizenship is also affected negatively when migrating citizens are caught by surprising and impenetrable regulations in their host countries to the detriment of the quality of their housing and, thus, ultimately of their quality of life. Beyond the free circulation of tenants, the freedom of capital is also affected by tenancy law. In recent years, as a consequence of globalisation and the establishment of new asset classes such as Real Estate Investment Trusts (REITS), real estate and capital markets have integrated dramatically in Europe and beyond.¹³ These investments predominantly concern commercial property, but in some countries they also extend to large municipal housing stocks put on the market by cities which are under heavy financial constraints. Against this background, it is evident that the tenancy laws of a country are important economic parameters for investors.

However, the European impact on tenancy law derives not only from its importance to the Single Market but even more so from the manifold effects on tenancy law exerted by EU regulation and policy in other fields,¹⁴ which have developed since the extension of European integration beyond the Common Market after 1992. However, it seems that such effects are not always intentional but may instead constitute more or less unanticipated side effects of EU regulation and policy in other fields.

To start with, **EU social policy against poverty and social exclusion** extends to selected issues of housing, in particular the amelioration of housing conditions.¹⁵ Moreover, policy has also been affected by **European competi-**

employed in the territory of another Member State shall enjoy the rights and benefits accorded to national workers in matters of housing, including home ownership and in the allocation of public housing.

12 One example being the limit to six months' security of tenure afforded in the UK to a tenant with an assured shorthold tenancy, as is usual in the UK, which carries the risk of negative effects on the free circulation of workers, self-employed persons, pensioners and students.

13 For example in Germany, foreign companies and funds provide more than 50% of current real estate investment, compared to only 2-6% in the mid-nineties. Cf. Report of the Federal Government on Housing and Real Estate Economy in Germany of 4/6/2009, Bundestags-Drucksache 16/13325, 6, 14.

14 See, generally, on the EU involvement in land law, *P. Sparkes*, *European Land Law*, 2007.

15 See *Housing in EU Policy Making*, Background Paper of the European Federation of

tion and state aid rules to a certain degree, particularly with regard to State-subsidised social housing for the poor. In this context, the Commission allowed Ireland, for example, to provide bank guarantees for borrowings by the public Housing Finance Agency.¹⁶ Likewise, the Commission has repeatedly allowed public subsidies for housing developers aimed at promoting homeownership amongst socially disadvantaged groups in deprived urban areas.¹⁷ In **tax law**, the Council decided in 1992 that the supply, construction, renovation and alteration of housing provided as part of social policy may be subject to reduced VAT rates,¹⁸ whilst the letting of accommodation is completely exempted from VAT in all Member States.¹⁹ Further aspects of tenancy law are dealt with under **European consumer law**. Whereas the Doorstep Sales Directive excludes lease contracts from the scope of its application (Art. 3 para. 2 lit. a), the Unfair Terms Directive extends to clauses contained in lease contracts, provided that the tenant is a consumer and the landlord is a commercial entity (which generally requires him to let several apartments). The tenant is also protected against misleading advertising and similar practices by the 2005 Unfair Commercial Practices Directive, which provides in Art. 2 lit. c that “products” includes immovable property. In a completely different legal area, tenancy law is also affected by **European provisions on energy saving** according to which, inter alia, the landlord is bound to inform the tenant about the building’s energy consumption when they enter into the agreement. In Germany, these provisions have prompted the legislator to allow rent increases after modernisation measures aimed at energy saving (Arts. 554 para. 2, 559 BGB). Next, tenancy law is also dealt with under **European private international law**, including international procedural law. Thus, in actions concerning the lease of immovable property, Art. 22 no. 1 Brussels I Regulation establishes exclusive jurisdiction in the State where the property is located. Likewise, according to Art. 4 para. 1 lit. c Rome I Regulation, tenancy agreements are governed by the law of the place where the immovable property is situated. However, choice of law is possible even in residential tenancy agreements to the detriment of tenants, as the limitations on choice of law in consumer contracts

National Organisations working with the Homeless (Feantsa), 2002, available at <http://www.feantsa.org>.

- 16 Case N 209/2001. Interestingly, the decision did not exempt the measure under the state aid provision (Art. 107 TFEU), but qualified the provision of “a good dwelling in a good housing environment to every household and especially the most socially disadvantaged” as a service of general interest not to be affected by competition rules according to Art. 106 para. 2 TFEU.
- 17 Cases N 497/2001 and 239/2002.
- 18 See Annex H of Directive 92/77/EEC.
- 19 See *Housing in EU Policy Making*, op. cit., 5.

do not apply to tenancy contracts (Art. 6 para. 4 lit. c Rome I). Moreover, the provision of housing has been incorporated in **European anti-discrimination legislation**. Based on Art. 19 TFEU, introduced by the Treaty of Amsterdam, the Council adopted a Directive against discrimination based on race and ethnic origin in June 2000.²⁰ This Directive includes in Art. 3 para. 1 lit. h access to and the supply of goods and services available to the public, including housing. This is important in practice because members of ethnic minorities are often discriminated against with respect to access to housing. Finally, European constitutional law has only limited relevance in this area. Although the right to housing (“droit au logement”) is recognised in several Member States, including France and Italy, it is not recognised generally across the EU,²¹ and the drafters of the Nice Fundamental Rights Charter could only agree on including a right to “housing assistance” (without specifying what is meant by that term) in the Solidarity chapter of the Charter (Art. 34 para. 3). This has not however had a significant impact so far.

However, most of these fields do not determine the core of private tenancy law, but rather the regulatory context in which private contracts or land law rules and principles are embedded. The same cannot be said for the impact of the **European Convention of Human Rights** in this area, which has increased continuously in the last years, and almost 70 judgements affecting landlord and tenant relations have been delivered. So far, communication rights, non-discrimination rights, the protection of the private sphere and family life, due process rights and the landlord’s property rights have been applied to tenancy cases by the European Court of Human Rights. This jurisprudence is set out in greater detail in the next section (II). We then analyse to what extent important decisions on the economic basis of the tenancy relationship give rise to the emergence of a common core of European tenancy law in the form of a principle of socio-economic balance (III).

II. Important Judgements of the ECtHR affecting Tenancy Law

The case law of the European Court of Human Rights (ECtHR) involving tenancy issues covers a wide range of topics from (1) the more traditional due process rights of the landlord to (2) guarantees for the tenant against eviction and (3) modern communication and non-discrimination rights of the tenant to

20 Directive 2000/43/EC.

21 See the summary in *N. Boccadoro*, *La Reconnaissance d’un Droit au Logement en Droit Européen*, Working Paper, Institut International de Paris La Défense, 2001.

(4) a balancing of the landlord's property rights with national regulation that grants housing rights to the tenant. The latter jurisprudence affects the economic basis or, legally speaking, the core of the synallagmatic relationship between the parties and, therefore, matters most from the private law perspective.

1. *Due process rights of the landlord*

In a notably long line of cases originating in Italy, the ECtHR repeatedly found violations of landlords' due process rights, as well as violations of their property rights, in instances concerning extremely long waiting periods for eviction, even when the landlord intended to use a house or apartment for herself or close family members.²² Remarkably, between 1999 and 2005, the Court found violations in no fewer than 20 cases – from Italy alone – of the landlords' right to adjudication “within a reasonable time,” as protected under Art. 6(1) ECHR.

Immobiliare Saffi was the first in this series of cases.²³ Here, the applicant, a corporation, had become the owner of an apartment, which had remained occupied by holdover tenants since the expiry of the lease five years earlier. Despite an order of possession issued by the local magistrate, the tenant refused to vacate the premises, and the bailiffs' numerous attempts to enforce the order were unsuccessful. This failure was due in great part to a statutory provision regulating the suspension of orders of possession, which prohibited the use of the police when attempting to enforce such orders. The owner was able to recover possession of the apartment only in consequence of the tenant's death some thirteen years after the expiry of the actual tenancy and eight years after the owner had first attempted to dispossess the tenant.

The owner complained to the ECtHR that being effectively denied possession of its apartment property infringed its right to peaceful enjoyment in violation of Article 1 of Protocol 1 ECHR. Furthermore, and perhaps more interestingly, the owner also complained that the denial of access to police assistance and the unreasonable duration of the enforcement procedure violated its right to adjudication within a reasonable time in breach of Article 6(1) ECHR. The Court began its analysis by agreeing that the aim of the legislation in question was legitimate, that of preventing the large-scale simultaneous eviction of tenants, in order to preserve social and public order. The Court no-

22 See, e.g., Application no. 22774/93, *Immobiliare Saffi v. Italy* of 28/7/99; Application no. 22534/93, *A.O. v. Italy* of 30/5/00; Application no. 28272/95, *Ghidotti v. Italy* of 21/2/02; Application no. 64663/01, *Lo Tufo v. Italy* of 21/04/05.

23 Application no. 22774/93, *Immobiliare Saffi v. Italy* of 28/7/99.

ted that the series of measures adopted by the Italian government to control rent and to extend existing tenancies were intended as solutions to a chronic housing shortage. Nonetheless, such legislation must fairly balance the general interest and the protection of the fundamental rights of the individual. In the present case, nothing in the case file indicated that the tenants required any special protection from eviction. Nonetheless, the inflexible provisions of the statute resulted in multiple suspensions of the order of possession and a consequent six-year wait for its eventual execution. The Court, in finding a violation of Article 1 of Protocol 1 ECHR, concluded that this unnecessary denial of the owner's possession of its property had imposed an excessive burden on the owner without striking the requisite balance of interests.

Furthermore, in considering the applicant's complaint of violation of the right to adjudication within a reasonable time, the Court stated that a legislative intervention should not unduly delay the execution of a judicial decision. The legislation challenged in the present case included a provision authorising a prefect, appointed by the legislature, to determine the ultimate enforcement of possession orders, with no judicial review available for these extrajudicial decisions. According to the Court, this deprivation of the owner's right to have its dispute decided finally by a court not only violated Article 6(1) ECHR, but was incompatible with the principle of rule of law as well.

2. *Guarantees for the tenant against eviction*

A second line of cases relates to a person's housing rights, as enshrined in Article 8 ECHR, which explicitly protects private and family life, the home and the correspondence of a person. A right to respect for the home is being defined and refined in the context of tenancies, and a significant number of these cases originated in the United Kingdom. The Court has articulated as the common core of this line of case law the principle that any person at risk of losing his home should be able to have the proportionality of the measure determined by an independent tribunal, even if, under domestic law, the right to occupation has come to an end.²⁴

In the first of these cases, the applicant and his family (including four children) were gypsies living a nomadic lifestyle in the UK.²⁵ They ultimately decided to settle on a so-called gypsy site operated by a local public authority. After sixteen years of occupation on their plot in the gypsy site, the local authori-

24 See, e.g., Application no. 19009/04, *McCann v. United Kingdom* of 13/5/08; Application no. 37341/06, *Kay v. United Kingdom* of 21/9/10.

25 Application no. 66746/01, *Connors v. United Kingdom* of 27/05/04.

ties summarily dispossessed the applicant and his family, citing breach of the lease agreement, which prohibited the causing of a nuisance on the site. Despite the fact that several of the family members were in fragile health or that forcing the family to move on would jeopardise the schooling of the applicant's children, the family was quickly evicted in the early-morning hours. Although procedural protections existed for the occupants of caravans under the Mobile Homes Act of 1983, due to an exception for gypsy sites, the applicant had no opportunity to contest the eviction based on his particular personal circumstances.²⁶ The result of this eviction was that the family received no assistance or advice, other than an offer to be moved to a distant location, an option which disregarded the roots that they had established in the community in which they had lived for over twenty years. The applicant claimed that, in large part as a result of the stress of having repeatedly to move after their eviction, his wife decided to separate from him and their children did not return to school.

The applicant complained, pursuant to Article 8 ECHR (the right to respect for family life and for the home), that he had not been given a hearing to challenge the allegations against him leading to the eviction, which had resulted from the fact that the local public authorities running the gypsy sites were not required to prove their alleged grounds for evicting tenants, unlike the owners of privately run sites. The central issue in this case became whether the legal framework applicable to the occupation of gypsy sites provided the applicant with sufficient legal protection of his rights, and the Court found that the summary eviction procedure employed in this case did not. The State had failed to show that this system – which enabled the government to evict tenants of gypsy sites without having to explain the basis for the eviction, which could then be subjected to the scrutiny of an independent tribunal – did not pursue any specific aim and did not further any benefit to the community or to gypsies. On the contrary, the Court found that the existing system placed significant obstacles in the way of those pursuing a nomadic gypsy lifestyle while denying procedural rights to those striving to establish a more settled existence. Accordingly, the Court found that the eviction was not accompanied by the requisite procedural safeguards and was neither justified by a pressing social purpose nor proportionate to a legitimate aim. The eviction therefore constituted a violation of Article 8 ECHR.

26 Compare EuSoCo Principles, Principle 5, proposing that the provision of services of first necessity, such as housing, requires social regard for physical and psychological aspects to protect weaker parties, including taking into account the nature, duration and importance for the lives of the persons affected; also EuSoCo Declaration, Clause 5 calling for lifetime contracts to provide social justice related to human needs.

The ECtHR recently revisited the right to respect of a person's home in a decision involving facts very similar to the case discussed above. A gypsy mother and her two children had been threatened with eviction from the plot they occupied in a gypsy site, with no opportunity to challenge the government's grounds for the eviction.²⁷ What distinguishes this case from the previous one is that, here, the applicant had availed herself of a twelve-month suspension of the eviction order that had become available under amendments made to the law since the earlier case. However, the applicant argued that such a suspension provided insufficient procedural protection because she was still unable to challenge the ultimate basis of the eviction in a hearing before an independent tribunal.²⁸ The Court agreed, concluding that the system continues to violate Article 8 ECHR by denying occupants of gypsy sites the requisite procedural safeguards for assessing the proportionality of the interference with their right to respect for their home.

Both of these cases emphasise how the Court considers the loss of a home to be an extreme intrusion into the right of respect for the home. The Court repeatedly stated that any person at risk of such a deprivation must have the opportunity to have the proportionality of the interfering measure evaluated by an independent tribunal according to Article 8 ECHR, even if the legal right to occupy the home has ended. Another series of ECtHR decisions concerning this issue originating in Croatia has led to the same analysis. For example, the applicant in the most recent example from Croatia complained that an order to evict her from the apartment where she had lived for over two decades had, in view of her advanced age and fragile health,²⁹ infringed her right to respect for her home, especially in view of the fact that she had no other home to go to.³⁰ Here again, the Court found that Article 8 ECHR demanded that the proportionality of her eviction be evaluated by an independent tribunal in view of her personal circumstances, even if her legal right to occupy the apartment had been extinguished by domestic law. This seems to have become the central principle in the ECtHR's Article 8 analysis in the context of tenancy law.

27 Application no. 40060/08, *Buckland v. United Kingdom* of 18/9/12.

28 Compare EuSoCo Principles, Principle 11, which states that the termination of life-time contracts must be transparent, accountable and socially responsible.

29 Compare EuSoCo Principles, Principle 5; also EuSoCo Declaration, Clause 5.

30 Application no. 42150/09, *Bjedov v. Croatia* of 29/05/12; see, also, Application no. 48833/07, *Orlic v. Croatia* of 21/6/11; Application no. 3572/06, *Paulic v. Croatia* of 22/10/09.

3. *Communication and non-discrimination rights of the tenant*

Like the German Constitutional Court under the *Grundgesetz*, the ECtHR has also protected the tenant's right of communication under the Convention. In particular, the ECtHR has recognised the right of a tenant of foreign origin to install a satellite television dish to receive radio and television channels from her home country, a right derived from the freedom of opinion enshrined in Art. 10 ECHR.³¹ Tenants of Iraqi origin renting an apartment in Sweden put into use an existing satellite dish located on the outside of the apartment building in violation of a term in the lease agreement. The landlord sought eviction of the tenants, and the Swedish court ruled in favour of the landlord. The tenants then complained to the ECtHR that, under these circumstances, the domestic court's eviction order violated Article 10 ECHR (right to freedom of expression). The Court held in favour of the tenants, reasoning that the tenants and their children could maintain contact with their ethnic language and culture only via satellite TV broadcasts which were not available through a standard antenna. The Swedish government, supporting the arguments put forward by the landlord, argued that safety and aesthetic considerations compelled upholding the restriction in the lease on installing satellite dishes, also arguing that the comprehensive set of tenancy laws would be undermined if not consistently enforced. In response to these arguments, the Court found, in this particular case, that the satellite television dish posed no safety hazard, and that aesthetic considerations did not apply to this apartment building, as it had no particular architectural merit. In balancing the tenants' rights under Article 10 ECHR against these safety and aesthetic considerations, it was found that the tenants' rights should prevail. The Court also noted that the landlord had made no other attempt to enable the tenants to receive such broadcasts, such as by installing internet access. Furthermore, the fact that a family with three children had been evicted from their home was found to be disproportionate to the purported aims, as this interference with the protected right had gone beyond what was necessary in a democratic society.

The ECtHR has, in other decisions, also upheld the non-discrimination rights of tenants.³² A significant decision was given, for example, in relation to the succession of an interest in a lease, in the context of a homosexual partner's rights under a tenancy. In its first decision pertaining to this issue in the Austrian *Karner* case, the Court considered whether Article 14 ECHR (prohi-

31 Application no. 23883/06, *Mustafa et al. v. Sweden* of 16/12/08.

32 This is consistent with EuSoCo Principles, Principle 8, which insists that providers of housing refrain from discrimination based on personal and social characteristics in all stages of the contractual relationship.

bition against discrimination), taken together with Article 8 ECHR (right to respect for private and family life), provides protection against discrimination based on sexual orientation in the context of the right to succeed to a tenancy after the death of the partner who had been a party to the lease agreement.³³ Here, the applicant had shared a flat with his homosexual partner. After discovering that his partner was terminally ill, the applicant cared for him until his death, before which the partner had named the applicant as his sole beneficiary in his will. The landlord later initiated proceedings to terminate the tenancy. In dismissing the action, the Austrian court considered that homosexual partners also enjoyed the statutory right of family members to succeed to a tenancy. That decision, initially upheld on appeal, was subsequently overturned by the Austrian Supreme Court, which found that the notion of "life companion" had to be interpreted as at the time the statute had been enacted and that the legislature's intention at that time had not been to include persons of the same sex.

The applicant complained under Article 14 ECHR, in conjunction with Article 8 ECHR, that he had been the victim of discrimination based on his sexual orientation. The Court reasoned that different treatment due to sexual orientation must be founded on particularly grave reasons, to which the Austrian government argued that the purpose of the statute in question was the protection of the traditional family unit. While the Court recognised that this was, in principle, a legitimate aim, it found it to be so abstract as to permit a broad range of measures to pursue it in practice. In this instance, the principle of proportionality between the aim pursued and the measures implemented required the State to show that excluding homosexual couples from the scope of the legislation was necessary to achieve that aim. The Court found that the State's arguments did not support such a conclusion and held that the domestic court's order terminating the lease therefore violated the prohibition against discrimination protected by Art. 14 ECHR in conjunction with the right to respect for private and family life enshrined in Art. 8 ECHR.

Another decision by the ECtHR dealing with facts similar to those of the previous case required the ECtHR to apply Article 14 ECHR and Article 8 ECHR in contradiction of a provision in Poland's national constitution.³⁴ In this case, the Polish authorities and courts cited an article in their national constitution defining marriage as 'a union of a man and a woman' as justifying their refusal to recognise the tenancy rights of a homosexual partner. Based largely on this constitutional argument, they insisted that the only legally recognised form of cohabitation relationship is that between a man and a woman. The ECtHR disagreed with this argument, holding that the refusal to recognise

33 Application no. 40016/98, *Karner v. Austria* of 24/7/03.

34 Application no. 13102/02, *Kozak v. Poland* of 2/3/10.

the cohabitation of same-sex partners was a violation of Article 14 ECHR and Article 8 ECHR. Although the Court did not dispute the legitimacy of the aim of protecting the traditional notion of the family as being rooted in the union of a man and a woman, the Court said that the State must balance protecting that notion of family with the rights under the Convention of sexual minorities. The Court, in finding that ‘*de facto* marital cohabitation’ must be understood in this context to include persons in a homosexual relationship, imposed a requirement on nation states to take developments in society into consideration.

4. *Balancing the landlord’s property interests*

A fourth line of cases deals with the property rights of landlords in the context of the imposition of lease conditions on owners, or even the imposition of the lease itself by regulation or administrative decree.

The first ECtHR decision in this area originated in the United Kingdom. This case concerned the right of tenants under leases for a term of over twenty years to acquire full ownership of the property, as established under the Leasehold Reform Act of 1967. The applicants had been named as trustees of a substantial estate under a will left by a member of the landed aristocracy.³⁵ Tenants of some of the properties in the estate exercised their rights of acquisition under the Leasehold Reform Act of 1967, thereby depriving the trustees of their interest in these properties. The trustees applied to the ECtHR, complaining that the forced transfer of the properties and the amount of compensation they subsequently received violated their property rights under Article 1 of Protocol 1 ECHR. Furthermore, the applicants complained that their inability to challenge the legality of the act violated Article 13 ECHR and that the transfer itself was discriminatory and, therefore, violated Article 14 ECHR.

The Court reasoned that a government may be permitted to compel the transfer of property as a legitimate means of pursuing a public interest, provided that the means of depriving the person of property is not disproportionate to the aim sought. With regard to the legitimacy of the State's aim, the Court deferred to the national legislature's judgment to determine what falls within the public interest – unless that judgment is manifestly unreasonable – when implementing social and economic policies. Consequently, it found that the alleviation of social injustice in housing was a legitimate aim as pursued by its Leasehold Reform Act, which fell within the legislature's “margin of appreciation”.³⁶ As for the proportionality of the measures implemented by the State,

35 Application no. 8793/79, *James and others v. United Kingdom* of 21/2/86.

36 “Margin of appreciation” refers to the space to manoeuvre granted to national au-

the Court found that providing tenants with rights of acquisition in these circumstances was neither unreasonable nor disproportionate, as the statute limited this right to less valuable properties that were perceived by the legislature as representing the most severe cases of hardship. The Court therefore held that interference with the applicants' property in furtherance of the public interest did not violate Article 1 of Protocol 1 ECHR.

In response to the applicants' complaint that they were afforded no mechanism to contest the legality of the Leasehold Reform Act, the Court stated that Article 13 ECHR did not require that a remedy exist in the form of a challenge to legislation introduced by a national authority. The provisions of the article required only that an individual be able to ensure compliance with the law through the judicial process, and the applicants in this case had such a judicial process at their disposal. Finally, in considering the applicants' complaint of discrimination under Article 14, the Court recognised that the statute in question was indeed discriminatory in that the measure applied only to a certain class of property, that of housing under a long lease, and that the statute had a harsher impact on landlords with property of lower value than on those with property of higher value. The Court stated that differences in treatment are not discrimination if there is an objective and reasonable justification for the different treatment. The Court reasoned that, taking into account the State's margin of appreciation, there was no basis on which to find that the difference in treatment was not objectively and reasonably justified and within the scope of the exercise of a nation state's legitimate authority, or that the applicants were forced to bear an unreasonable burden. The Court held that there had therefore been no violation of the Convention in this case.

A similar result was achieved in the *Mellacher* case from Austria. In this case, landlords who owned or had an ownership interest in multiple apartment buildings complained that introduction of a statutory reduction in rent violated Article 1 of Protocol 1 ECHR and was an unjustified interference of their right to peaceful enjoyment of their property.³⁷ At least one tenant in each of the apartment buildings owned by the applicants applied for a reduction in rent on their existing lease under the Rent Act of 1981. In considering the rent reductions in light of the ECHR, the Court accepted that the rent reductions permitted under the Rent Act amounted to an interference with the owners' property rights and, thus, fell within the scope of Article 1 of Protocol 1 ECHR. However, the

thorities when fulfilling their obligations under the European Convention on Human Rights. *S. Greer*, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, Council of Europe, 2000, p. 5.

37 Application no. 10522/83, 11011/84, 11070/84, *Mellacher and others v. Austria* of 19/12/89.

Court did not find the Rent Act to be disproportionate to the aim pursued, and held that the enforcement of rent reductions against the owners in this case therefore did not violate the Convention's protection of property rights. In evaluating the legislation under challenge by the claimants, the Court recognised the national legislature's wide margin of appreciation in both identifying a problem of public concern and in determining the measures needed to further the social and economic policies adopted to address it, in this case, in the field of housing. Furthermore, it was not for the Court to scrutinise whether the measures chosen by the State embodied the most effective solution to the problem, so long as those measures did not exceed the limits of the State's margin of appreciation. Applying these principles to the present case, the Court found that it could have been reasonable for the Austrian lawmakers to conclude that social justice required reducing the original rents and that the rent reductions flowing from the statute, although substantial, did not necessarily place a disproportionate burden on landlords. The Court held, therefore, that the Rent Act did not violate the owners' property rights under Article 1 of Protocol 1 ECHR.

However, this rather lenient approach towards regulatory or administrative restrictions on the landlord's property rights in favour of tenants seems to have changed in more recent jurisprudence. In a case originating in Malta, the owner's tenement and adjoining field were requisitioned by the government to provide housing for the homeless.³⁸ Following a decision by the national court that the state's requisition of the property and the compensation paid did not violate the owner's property rights, the owner complained to the ECtHR of a violation of his property rights as protected under Art. 1 of Protocol No. 1 to the ECHR, claiming that he had been deprived of his property for almost 30 years and that the rent he received in compensation was ridiculously low compared to the market rate. In considering the complaint, the Court noted that the State's requisition of the property imposed an involuntary landlord-tenant relationship on the owner, who had no influence over the selection of the tenant or over any of the fundamental terms of the tenancy. The Court commented further that the level of rent fixed as compensation was not sufficient to meet the owner's legitimate interest in deriving profit from his property. Finding that the requisition had imposed a disproportionate and excessive burden on the owner, who was compelled to substantially bear the social and financial costs of providing housing for others, the ECtHR concluded that the state had failed to strike the requisite balance between the general interests of the community and the protection of the owner's property rights, in violation of Art. 1 of Protocol No. 1 ECHR.

38 Application no. 17647/04, *Edwards v. Malta* of 24/10/06.

Another Maltese case concerned an owner's inability to repossess his house on the expiry of a lease and the frustration of his entitlement to receipt of a fair and adequate rent from the property.³⁹ At the time that the owner acquired the premises from his parents, the property was subject to a 25-year lease. At the end of the term, the owner informed the tenants that he did not wish to renew the lease and that the tenants should vacate the premises. The tenants desired to stay in the house and availed themselves of the right to retain possession of the property under a renewed lease, relying on a law enacted in 1979 creating a right for a tenant to retain possession of a rented property after expiry of the lease against the objection of the owner. The national court rejected the owner's claim that he had been denied property without adequate compensation, finding that the national law furthered the legitimate purpose of preventing large-scale evictions. Furthermore, the national court found that the amount of compensation provided to the owner was higher than what would have been available under other national rent laws and was, therefore, not a violation of his property rights.

Consequently, the owner complained to the ECtHR that he had been denied the use of his property without adequate compensation in violation of Article 1 of Protocol No. 1 ECHR. In response to the owner's complaint that the 1979 law imposed on him a unilateral lease for an indefinite term without fair and adequate rent in violation of his property rights, the Court reasoned that by law the owner could not physically possess his house and had no effective remedy to empower him to either evict the tenants or demand an adequate rent. The Court again noted that the owner had been expected to bear the greater burden of the social and financial cost of housing these tenants. The Court therefore found that the national law at issue lacked the procedural safeguards required to balance the interests of the tenants and the owners and concluded that the Maltese rent law had been applied in violation of the owner's property rights, as protected under Art. 1 of Protocol No. 1 ECHR.

In a further interesting case from Poland,⁴⁰ a rent-control scheme that had evolved from legislation introduced under the former communist government created a system of restrictions on landlords that set rent ceilings so low that landlords were unable to realise profits from their property or even recover the cost of legally mandated repairs. The landlord in this case complained to the ECtHR that the situation created by this system taken as a whole violated her right to the enjoyment of her property under Art. 1 of Protocol 1 ECHR. The Court acknowledged that the difficult housing situation in Poland – in particular an acute shortage of dwellings and the high cost of acquiring apartments on

39 Application no. 47045/06, *Amato Gauci v. Malta* of 15/9/09.

40 Application no. 35014/97, *Hutten-Czapska v. Poland* of 19/6/06.

the market, as well as the need to transform the outdated system of distributing dwellings that had developed during the communist regime – justified not only the introduction of remedial legislation to protect tenants during the reform of the country’s political, economic and legal system but also the setting of a rent ceiling below the market rate. However, the Court found that Polish housing legislation suffered from systemic problems, in that the restrictions on rent increases imposed on landlords made it impossible for them to receive rent reasonably related to the general cost of legally mandated maintenance.⁴¹ Simply put, under this scheme, letting property was a losing proposition for owners, and the Polish government had an obligation to eliminate the problem or to find a prompt remedy. In considering the consequences that the rent-control scheme had for the rights of landlords to the peaceful enjoyment of their property, the Court concluded that the Polish authorities had imposed a disproportionate and excessive burden on landlords in violation of Art. 1 of Protocol 1.

The property rights of landlords remains a hot topic in ECtHR case law, as evidenced by a case originating in Norway.⁴² In 2004, amendments to the country’s Ground Lease Act granted lessees of land used for permanent or holiday homes the right to extend their leases on the same terms as the previous lease for an unlimited period of time. The lessees requested that their landlords extend their leases on the same terms as the previous lease, with no increase in rent. The owners of the properties attempted to negotiate alternative conditions without success and complained to the ECtHR that application of the 2004 amendments violated their right to protection of their property in breach of Art. 1 of Protocol 1 ECHR. The Norwegian Supreme Court had already held, in prior proceedings instituted by lessees who were themselves not involved in the complaint to the ECtHR, that these provisions aimed at protecting the lessees’ right to housing did not violate the ECHR.

In considering the challenge to the Norwegian Ground Lease Act, the Court found that the aim pursued by the legislation to protect the interests of leaseholders lacking financial means was legitimate, as the lifting of rent controls in 2002 had substantially affected many unprepared tenants by drastically increasing their ground rent. With regard to the proportionality of the measures, however, the Court reasoned that, because the extension of the ground lease contracts imposed on the owners had been for an indefinite period with no possibility of any meaningful increase in rents, the actual value of the land would not be relevant in the assessment of the level of rent in such leases. Furthermore, only the lessees could choose to end the leases and were also free to assign

41 Using the terminology of EuSoCo Principle 9, this system placed grossly disproportional obligations on the landlord.

42 Application no. 13221/08, *Lindheim and others v. Norway* of 12/6/12.

the leases to third parties, and any change in ownership on assignment by the lessee would not affect the level of rent, as this control on the level of rent would be in force indefinitely. These factors effectively deprived the owners of any enjoyment of their property, including the possibility of disposing of their property at a fair market value. Consequently, the Court concluded that the financial and social burden had been imposed on the lessors alone and held that the legislation violated the owners' right to protection of their property.

Another relatively recent case regarding the balance of the parties' contractual obligations arose in the context of privatisation, i.e. the reversal of nationalisation of the housing market in Romania. Here, the ECtHR considered the compatibility with the Convention of an emergency government order regulating evictions, which severely punished landlords for non-compliance with that order.⁴³ Here, the applicants were the former owners of three blocks of apartment buildings, which had been nationalised during the period of communist rule. A court judgment required that the property be returned to the former owners, who subsequently recovered possession of the apartment buildings concerned. The owners, now landlords, offered new leases to the tenants occupying the apartments, who had previously had State tenancies, but the tenants declined to sign the leases proposed by the landlords. The landlords then applied for eviction orders, which failed due to the landlords' omission of some of the legal formalities required under an emergency government order regulating eviction proceedings. An additional consequence of their non-compliance was the automatic extension of the tenants' leases. The applicants were eventually able to evict these tenants several years later, but they were unable to collect any rent arrears that had accrued during the occupancy imposed under the emergency government order.

The owners complained to the ECtHR that the prolonged denial of possession of their property and the subsequent loss of rent violated Article 1 of Protocol 1 ECHR. In scrutinising the measures implemented by the Romanian government, the Court focused on the heavy penalty imposed on the landlords, namely, the significant burden of providing housing for up to five years with no effective ability to recover the rent for that period. The Court found that these provisions placed landlords under an excessive and involuntary burden of meeting the cost of housing others, and held that the emergency government order violated the owners' property rights protected by Article 1 of Protocol 1 ECHR.

43 Application no. 68479/01, *Radovici and Stanescu v. Romania* of 02/11/06

III. Some Provisional Conclusions: Towards a Principle of Socio-Economic Balance?

Whilst the jurisprudence of the Court on tenancy law remains to be analysed in depth in the context of the current comparative ZERP project on this subject,⁴⁴ some provisional conclusions may be presented here.

Firstly, the quantity and breadth of the jurisprudence in this field, particularly in the last 10 years, has become impressive and may surprise observers unfamiliar with these developments. As outlined above, the Court has delved into housing issues on the basis of numerous fundamental rights, ranging from more traditional ones, such as due process, to more modern ones, such as guarantees relating to communication and non-discrimination. The court appears to have abandoned its former judicial self-restraint, which was based on the close national and regional character of the provision of housing and the correspondingly wide margin of appreciation accorded to national regulatory and administrative authorities. The ECtHR is therefore becoming a serious player in the field and can no longer reasonably be ignored at national level. Just as it has been contended for the German Federal Constitutional Court, the ECtHR might thus be seen as approaching the status of the “highest first instance court” of the continent.

From a private law perspective, the cases which matter most are those in which the Court scrutinises the owner’s property rights against national regulations protecting the tenant. As stated, these cases go to the heart of the contractual relationship between the parties. Unlike the German Constitutional Court, the ECtHR has not yet derived from the tenant’s possession of the house a property right requiring constitutional protection. That notwithstanding, the results reached by the Court are roughly similar. As is apparent from the cases reported from Malta, Poland and Norway, the Court seems to base its reasoning on a kind of socio-economic balance. Whilst all sorts of legislative and administrative restrictions of the landlord’s property rights have been found legitimate for the purpose of protecting tenants, a limit is reached when the economic balance of the contractual exchange is manifestly disturbed, i.e. when the rent to be gained by the landlord is so low that it does not even cover his or her costs or when the landlord is restrained from repossessing the house for an excessive, even unlimited, period of time.

It is true that the Court has not yet had to face crucial questions of principle

44 “Tenancy Law and Housing Policy in the EU” (www.tenlaw.uni-bremen.de) under the EU’s Seventh Research Framework Programme, which is coordinated by the *Centre of European Law and Politics (ZERP)* at Bremen University.

which go to the heart of national legal policy preferences, i.e. whether the legal impossibility of terminating a tenancy agreement when a tenant has complied with his or her duties (even if the landlord needs the house for himself or close relatives, as foreseen for example in Scandinavian countries) is lawful, provided that an adequate rent is paid and reasonable rent increases are possible. If the Court actually decided to interfere with such national regimes, a constitutional recognition of the tenant's possession rights (not limited to existing controls over eviction) would become urgent in order to maintain a just balance between the parties at the level of European constitutional law. Indeed, the Court would then also need to review solutions that operate to the serious disadvantage of the tenant, such as the "assured shorthold tenancy", which is the standard arrangement in the UK, in which the tenant has a guaranteed rental period of only 6 months. The result of this form of tenancy is that, if tenants invoke any statutory rights, they risk termination of their tenancy by the landlord on expiry of the six-month period (retaliatory eviction). However, it is in our submission unlikely that the ECtHR will go so far as to censure such national solutions which, though working to the clear disadvantage of tenants, may still be viewed not as arbitrary disempowerment of tenants, but as legitimate political solutions at national level. That notwithstanding, the ECtHR already seems to be willing to protect, through ownership rights exercised against regulatory and/or administrative interventions, an adequate basic balance in the contractual obligations of the parties – in other words, a kind of modern European *laesio enormis* which is likely to evolve further in the near future.

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